IN THE

Supreme Court of the United States

October Term, 1978

No. 78-877

JOHN L. CONNOLLY, C. V. HOLDER, HOWARD C. DENNIS, JOHN C. MAXWELL, JAMES J. KIRST, C. WILLIAM BURKE, KENNETH J. BOURGUIGNON, JOSEPH H. SEYMOUR, RICHARD L. CORBIT, HAROLD EDWARDS, DONALD E. MIER, WILLIAM C. WAGGONER, RICHARD GANNON and ALFRED HARRISON, each in his respective capacity as Trustee of the OPERATING ENGINEERS PENSION TRUST,

Petitioners,

vs.

PENSION BENEFIT GUARANTY CORPORATION, a non-profit corporation established within the Department of Labor of the United States of America,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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November 1978.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, the above-named Trustees of the Operating Engineers Pension Trust, join herein and pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit finally entered on September 8, 1978, in Case No. 76-2777 of that Court.

Opinions Below.

The opinion of the Court of Appeals is reported at 581 F.2d 729 and appears at Appendix A (pp. 1a-12a) of this Petition. The order of the Court of Appeals denying the petition for rehearing and rejecting the suggestion for a rehearing *en banc* appears at Appendix B (p. 13b) of this Petition. The decision of the United States District Court for the Central District of California is reported at 419 F.Supp. 737 and appears at Appendix C (pp. 14c-25c) of this Petition.

Jurisdiction.

The opinion of the Court of Appeals was filed on May 4, 1978, and entered on May 9, 1978. A timely petition for rehearing and suggestion for rehearing *en banc* by the Petitioners was denied by order of the Court of Appeals filed on September 6, 1978, and entered on September 8, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

The questions presented by this petition are:

1. May the Employee Retirement Income Security Act of 1974 be fairly construed to classify as a "defined contribution plan" a pension plan under which the employer's contribution is fixed and the employee receives whatever level of benefits the amount contributed on his behalf will provide? Or,

2. Did Congress intend, as the Court of Appeals concluded, "to impose substantial, new and in some cases retroactive liabilities upon the contributing employers" of multi-employer pension trusts by changing "defined contribution plans" to "defined benefit plans" through passage of the Act?

Statutes Involved.

This case involves §§ 3(34) and 3(35) of the Employee Retirement Income Security Act of 1974, ("ERISA" or "Act"), 88 Stat. 838, 29 U.S.C. § 1002 (34), (35), which provide as follows:

> "(34) The term 'individual account plan' or 'defined contribution plan' means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.
>
> "(35) The term 'defined benefit plan' means a pension plan other than an individual account plan [defined contribution plan] . . ."

Section 4021 of the Act, 88 Stat. 1014-16, 29 U.S.C. § 1321, identifies pension plans which are not covered by the "plan termination insurance" provisions of the Act, in pertinent part, as follows:

> "(b) This section does not apply to any plan—
>
> (1) which is an individual account plan [defined contribution plan], as defined in paragraph (34) of Section 1002 of this Title . . .
>
> "(c)(1) For purposes of subsection (b)(1) of this section, the term 'individual account plan' [defined contribution plan] does not include a

plan under which a fixed benefit is promised if the employer or his representative participated in the determination of that benefit."

Interpretation of these statutory provisions will require consideration of the provisions of the Act as a whole. The Act, 29 U.S.C. §§ 1001-1381, 88 Stat. 829-1035, is voluminous and is separately presented for convenience.

Statement of the Case.

This case presents for decision whether ERISA changed the basic legal structure of all multi-employer pension trusts from "defined contribution plan" to "defined benefit plan". The District Court concluded that the Pension Plan of the Operating Engineers Pension Trust remains a "defined contribution plan" providing whatever level of benefits can be afforded based upon the contribution paid by participating employers, and is not a "defined benefit plan" in which the employer has promised a fixed retirement benefit. The Court of Appeals reversed, ruling that the Pension Plan cannot qualify as a "defined contribution plan" under the statutory definition of ERISA because the Plan pays benefits in the nature of a pension rather than providing merely an individual "savings account" for each employee covered by the Plan.

The Court of Appeals held that forcing upon the contributing employer "a greater obligation and liability than he had originally agreed to in his contract . . . [was] . . . precisely what the termination insurance provisions of the Act were intended to do." Citing §§ 4062-68 of ERISA [88 Stat. 1029-33, 29 U.S.C. §§ 1362-68], which impose contingent liability for payments up to 30% of the net worth of each employer who contributes to a "defined benefit plan", the Court

of Appeals ruled that "*the precise intent of these sections was to impose substantial, new and in some cases retroactive liabilities upon the contributing employers of the plan.*" (Emphasis added.) (*App.*, pp. 6a-7a.)

The Operating Engineers Pension Trust was established in 1960 and now holds more than $250,000,000 in assets for the benefit of nearly 30,000 employees. An estimated 2,000 other multi-employer pension trusts are similarly established under §302(c)(5) of the Labor-Management Relations Act of 1947 [61 Stat. 157, 29 U.S.C. § 186(c)(5)] with "defined contribution plan" legal structures comparable to this Trust.[1] Such pension trusts together hold $35 Billion in assets for the benefit of 8.5 million covered employees.

Protecting the integrity of the trust instrument, and securing fair play for contributing employers would be sufficient reasons for granting review in this case. But the Board of Trustees of the Operating Engineers Pension Trust seek this review out of profound concern that the Court of Appeals' decision *will actually cause the financial collapse of the Trust and multi-employer pension trusts across the country.*

[1]The critical provisions of the Trust Agreement and the Pension Plan are quoted in the Opinion of the District Court, 419 F.Supp. at 739-40 (*App.*, pp. 18c-20c). PBGC and organizations filing *amicus* briefs in the Court of Appeals concur that the trust instrument and pension plan in this case "structurally typif[y] the overwhelming majority of collectively-bargained multi-employer pension plans, so-called Taft-Hartley plans."

Reasons for Granting the Writ.

1. Fundamental Importance of Question Presented.

The Court of Appeals has decided a federal question in a way in conflict with this Court's decision in *Alabama Power Co. v. Davis,* .... U.S. ...., 97 S.Ct. 2002 (1977).[2] To the extent that the statutory interpretation of "defined contribution plan" in *Alabama Power Co. v. Davis* may be regarded as collateral rather than controlling precedent, the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

2. Review of the Court of Appeals Decision at This Time Is Urgently Needed to Prevent Immediate and Irreparable Damage to Multi-Employer Pension Trusts.

The Court of Appeals' decision is presently a major disruption in the orderly administration of multi-employer pension trusts and the normal continuation of collective bargaining relationships. This disruption arises essentially from these factors:

[2]In *Alabama Power,* this Court construed the same statutory definitions of "defined contribution plan" and "defined benefit plan" which are crucial in this case as follows:

> "Petitioner's plan is a *'defined benefit' plan under which the benefits to be received by employees are fixed and the employer's contribution is adjusted to whatever level is necessary to provide those benefits.* The other basic type of pension is a *'defined contribution' plan, under which the employer's contribution is fixed and the employee receives whatever level of benefits the amounts contributed on his behalf will provide.* See 29 U.S.C. § 1002(34),(35); . . ." (Emphasis added.) 97 S.Ct. at 2009, note 18.

As construed by this Court, the statutory definitions of § 3(34) and (35) of the Act maintain the traditional basis for distinguishing between a "defined contribution plan" and a "defined benefit plan"; *i.e.,* whether the employer has promised to provide a fixed contribution or a fixed benefit. This Court also stated that the Act "does not alter the nature of pension plans" in any manner relevant to the question presented in *Alabama Power.* 97 S.Ct. 2008, note 13.

(a) the imposition of new, substantial and retroactive liabilities on thousands of contributing employers creates a compelling impetus among those employers to terminate participation in multi-employer pension trusts;

(b) loss of the union right to strike to require employer participation in multi-employer pension trusts with pre-selected trustees will result, if trustees are deemed to promise benefits for which the contributing employers are liable;

(c) trustees are uncertain whether they are to act as independent fiduciaries in administering trust assets solely in the interests of participants and beneficiaries, or as employer representatives who incur liabilities subject to employer control; and

(d) trustees are uncertain of the proper implementation of this Court's decision in *Alabama Power Company v. Davis,* since the decision of the Court of Appeals has modified and greatly expanded the class of "defined benefit" plans expressly within the ambit of this Court's decision.

Each of these factors will significantly affect irreversible economic decisions and events in collective bargaining and pension trust administration within coming months. Many trustees, unions and employers across the country have watched this case and depended upon affirmance of the District Court's decision to sustain their longstanding practices. Now the Court of Appeals' decision forces hard decisions to be made by those trustees and collective bargaining parties about the drastic changes in their relationships seen by the Court of Appeals. Trustees of multi-employer pension trusts need and deserve the earliest possible resolution of the issues raised by this case.

3. Intense National Interest in the Issues Presented by This Case Will Assure Adequate Briefing and Examination of the Issues From All Points of View.

This case has been the subject of more concerted attention and discussion than any case since ERISA became law with the possible exception of *Teamsters, Local 705 v. Daniel*, Case Nos. 77-753 and 77-754, now pending decision by this Court. Unlike the *Daniel* case, however, the economic consequences of this case are not limited to the costs of implementing a regulatory scheme with disputed applicability to pension plans. The economic consequences of this case are as substantial as can flow from destruction of the basic legal structure which is essential to the viability of multi-employer pension trusts.

Six briefs *amicus curiae* were filed in the Court of Appeals by interested organizations. A comparable or greater degree of interest and participation in the proceedings of this Court can reasonably be anticipated.

4. The Financial Stability of Multi-Employer Pension Trusts Is Threatened by Immediate Wholesale Losses of Employer Participation.

Unless review of the Court of Appeals' decision is granted, a mass exodus of employers from participation in multi-employer pension trusts can be foreseen as resulting from two powerful forces.

One of these forces is the employer's economic incentive to avoid legislative/judicial imposition of "new, substantial, and in some cases retroactive" liabilities which those "sufficiently enlightened"[3] employers who

[3] *Allied Structural Steel Company v. Spannaus*, ... U.S. ......, 98 S.Ct. 2716, 2726 (1978).

have participated in such pension trusts never contracted to assume. Past union efforts have presumably maximized the number of employers participating in multi-employer pension trusts through collective bargaining agreements which set a "fixed contribution" by the employer. Unions cannot be expected to achieve the same number of employer agreements when the employer's liability is changed from a "fixed contribution" to *retroactive, uncertain, open-ended and joint liability with other contributing employers.*[4]

The second major force which will severely disrupt employer participation arises from recognition that the collective bargaining laws do not permit unions to strike to require participation in multi-employer trusts if the trustees serve as employer representatives. Briefly, the Court of Appeals' decision makes contributing employers contingently liable for the eventual cost of benefits adopted by the trustees and described in the Pension Plan. If the Pension Plan is a "defined benefit plan," the amount of an employer's liability to the Trust has been and will be varied by Trustee decisions regarding investments and pension benefits. In effect, the Trustee is deemed to be the employer's representative or agent for purposes of "promising" pension benefits or managing Trust assets. This new role for the Trustee directly conflicts with his duty as an independent fiduciary under prior law and under the Act to serve solely the interests of plan participants and beneficiaries. *Toensing v. Brown*, 528 F.2d 69, 72 (9th Cir. 1975). Act § 404(a)(1), 88 Stat. 877, 29 U.S.C. § 1104(a)(1). *This change in the relation-*

[4] Jett, "The Path to Destruction of Taft-Hartley Pension Trusts: Mandatory 'Defined Benefit Plan' Status", 28 *Labor Law Journal* 403, 406-408 (July, 1977).

ship between trustees and contributing employers from independent fiduciary to representative or bargaining agent removes the essential element from the legal structure of multi-employer pension trusts which has enabled unions to use the economic pressure of a strike to encourage employer participation.

This concern can best be illustrated by reference to the recent decision of the National Labor Relations Board in the case of *Sheet Metal Workers International Association, Local 493 (Central Florida Sheet Metal Contractors Association, Inc.)*, 234 NLRB No. 162, 97 LRRM 1476 (1978). In that case, the Board considered whether a union may lawfully strike to require employer participation in a multi-employer benefit trust with pre-selected trustees, in view of §8(b)(1)(B) of the National Labor Relations Act, as amended [61 Stat. 141, 29 U.S.C. § 158(b)(1)(B)].[5] The Board concluded that § 8(b)(1)(B) was not violated by a strike to require employer participation in a trust with pre-selected trustees. The Board's examination of the trust documents of that multi-employer welfare benefit trust and the applicable law showed that *the trustees were bound to act solely as independent fiduciaries and could not affect the extent of employer liability* through the performance of their discretionary functions in the internal administration of the trust. 97 LRRM at 1484-1487. Therefore, the Board concluded that the union could lawfully strike to require an employer to accept the pre-selected trustees to perform the fiduciary functions of internal administration of trust assets.

[5]"(b) It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances . . ." 29 U.S.C. § 158(b)(1)(B).

Considering the Board decision in *Sheet Metal Workers* in light of the Court of Appeals' decision in this case, § 8(b)(1)(B) will protect an employer from union pressure to accept a trustee whose daily decisions will affect the extent of employer contingent liability for the cost of pension benefits. If trustees are empowered to adopt and administer pension benefits for which contributing employers become liable under the Act, then labor organizations will lose the right to strike to require an employer to participate in an existing multi-employer pension trust. Each employer would have the right to choose, at its sole discretion, a single-employer pension plan with one or more management trustees who would be entirely faithful to the wishes of the appointing employer. The existing level of employer participation in multi-employer pension trusts cannot be maintained under those circumstances.

The National Labor Relations Board presently has pending decision a case raising the § 8(b)(1)(B) issue in the context of a major multi-employer pension trust. *United Mine Workers of America, Local No. 1854 (Amax Coal Company)*, Case Nos. 27-CB-900, 27-CC-571 [JD-(SF)-45-77]. In 1977, an Administrative Law Judge recommended a decision in that case upholding the union right to strike to require employer participation based upon substantially the same legal rationale as has now been adopted by the Board in the *Sheet Metal Workers* decision. Of course, the decision of the Court of Appeals in this case was not available at the time the Administrative Law Judge made his recommendation. If the Board were to accept the Court of Appeals' decision as correctly stating the changed relationship between contributing employers and trustees regarding liability for the costs of pension benefits, the results of such

a Board decision would be immediately and irreversibly damaging to multi-employer pension trusts. A Board decision that a union strike to require employer acceptance of pre-selected trustees violates § 8(b)(1)(B) would control unfair labor practice proceedings regulating union strikes at least until judicial review of the Board decision could prevail. Indeed, such a Board decision would appear to be well-founded under collective bargaining law if the Court of Appeals' decision is correct.

The financial shock of such developments would be more than many multi-employer pension trusts could withstand, even on an interim basis. A basic actuarial assumption underlying the financial soundness of each multi-employer pension trust is the projected future level of participation in the trust. Any appreciable reduction in employer participation (*i.e.*, flow of funds into the pension trust) causes a *per capita* increase in costs of benefits for remaining participants, which in turn may precipitate further contractions in participation, ultimately causing termination of the pension plan.[6] If unions are to have a reasonable chance to maintain the level of employer participation in multi-employer pension trusts, then unions must be able to continue their past practices of agreeing that employer liabilities will be limited to payment of a "fixed contribution" to the pension trusts. The Court of Appeals' decision takes

[6]Section 4043(b)(3) of the Act [88 Stat. 1024, 29 U.S.C. § 1343(b)(3)] requires a "defined benefit plan" to give PBGC written notice of a "reportable event" when the plan experiences a 20% decrease in the number of active participants within one plan year or a 25% decrease in the number of active participants within two plan years. Such a "reportable event" may result in involuntary termination of the pension plan by PBGC under Section 4042(a)(4) of the Act [88 Stat. 1021, 29 U.S.C. § 1342(a)(4)].

from unions the discretion to agree upon a "fixed contribution" employer liability, and thereby places multi-employer pension trusts in serious danger of termination within the near term. The granting of this petition will forestall such events.

5. Trustees Are Torn Between Conflicting Duties to Act as Independent Fiduciaries Solely in the Interests of Participants and Beneficiaries or to Respond to the Interests of Employers Who Are Newly Liable for All Costs of Pension Plan Benefits.

This is no mere theoretical concern, but a significant, practical dilemma. The efficiency of trustee decision-making and the outcome of deliberations on investments and benefits administration are undercut and compromised by the great uncertainty on this issue.

On the one hand, courts have forebade trustees from acting in a manner which provides collateral advantages to the union or the employers and have viewed the statutory scheme as reinforcing "the most fundamental duty owed by the trustee: the duty of undivided loyalty to the beneficiaries." *Blankenship v. Boyle*, 329 F.Supp. 1089, 1094-95 (D.D.C. 1971). The National Labor Relations Board in *Sheet Metal Workers* has rejected the contention that fiduciary obligations to plan beneficiaries can coexist with a trustee duty "to advance, whenever possible, the interests of their appointing parties". The Board adopted that conclusion after considering views of the Secretary of Labor that "the fiduciary obligations imposed by ERISA are diametrically opposed to the obligations of a collective bargaining representative" and that combining such duties would place the trustees "in a virtually untenable position regarding the proper execution of their fidu-

ciary duties" to plan participants. *Sheet Metal Workers, supra,* 97 LRRM at 1485-87. Scholarly authority expresses the established principle that trustees must display "complete loyalty to the interests of the *cestui que trust* and must exclude all selfish interest and all consideration of the welfare of third persons" based upon reasoning that "it is generally, if not always, humanly impossible for the same persons to act fairly in two capacities and on behalf of two interests in the same transaction." Bogert, *Trusts and Trustees,* 2nd Ed., § 543. These views are simply restatements of "the precept as old as Holy Writ that 'a man cannot serve two masters.'" Stone, "The Public Influence of the Bar," 48 *Harv. L. Rev.* 1, 8.

Yet, the holding of the Court of Appeals makes contributing employers ultimately liable for the costs of all decisions made by trustees appointed by the employers. That circumstance cannot reasonably foresee total abstinence by employers from attempts to influence or control trustee decisions. Indeed, the National Labor Relations Board has held that § 8(b)(1)(B) is specifically intended to insure that "an employer may bargain through a freely chosen representative that is completely faithful to his interests." *Sheet Metal Workers, supra,* 97 LRRM at 1486. See, also, the review of the purpose of § 8(b)(1)(B) by this Court in *Florida Power & Light Company v. International Brotherhood of Electrical Workers, Local 641,* 417 U.S. 790, 798-813, 94 S.Ct. 2737, 2741-49 (1974).

This Court's review of the Court of Appeals' decision in this case is urgently needed to remove the cloud of uncertainty over trustee decision-making by settling whether employers are liable for the costs of trustee

decisions and, if so, whether the trustee owes the employer any duty in that respect.

6. The Statutory Scheme of the Act Logically Lends Itself to an Interpretation Which Maintains the Traditional Distinction Between a "Defined Contribution Plan" and a "Defined Benefit Plan."

This Court's decision in *Alabama Power Company v. Davis, supra,* amply demonstrates this premise. Indeed, since the distinction between the two types of plans has such fundamental importance under pre-existing law and under the Act, and the Act maintains the nomenclature of "defined contribution plan" and "defined benefit plan" for the two basic types of plans, a view that Congress wrote the technical definition of "defined contribution plan" to re-classify substantially all pension plans as "defined benefit plans" is both logically and morally suspect.

Moreover, if the statutory definition of "defined contribution plan" is to permit a true "pension plan" to exist, then the definition logically means a pension plan whose benefits to the individual participant are based solely upon the plan assets allocated to the participant, and not upon any underlying employer promise secured by a pledge of employer assets.

7. The Legislative History of the Act Supports the View That Congress Intended to Maintain the Traditional Interpretation of "Defined Contribution Plan."

When the House Committee on Education and Labor considered the drafted legislation during 1973, five minority members of the Committee expressed opposition to any "[radical] changes [in] the basic legal structure" of pension plans and raised "a serious constitutional question as to whether by legislation we can

change the contract of the employer from a promise to make certain contributions to a fund to a promise to pay the pension supported by a pledge of the employer's assets." *Legislative History of [ERISA]*, pp. 2387-88. The legislation there under consideration covered *only* single-employer plans with plan termination insurance and employer contingent liability. In 1974, two of the Congressmen who expressed those views (Hon. Albert H. Quie and John N. Erlenborn) were members of the Joint Conference Committee which redrafted the legislation to cover "defined benefit plans" and exclude "defined contribution plans" from plan termination insurance and employer contingent liability. In reporting the bill drafted by the Joint Conference Committee back to the House, Mr. Erlenborn stated that he and the chairman of the House Education and Labor Committee had "come to almost total agreement." *Legis. Hist.*, pp. 4662-68. Moreover, the chairman of the House Committee on Ways and Means (Hon. Al Ullman) stated on the floor of the House at the time of enactment that "plan termination insurance is mandatory for private defined benefit plans" with no indication that the Joint Conference Committee intended an abandonment of the traditional distinction between a "defined contribution plan" and a "defined benefit plan". *Legis. Hist.*, p. 4678. Likewise, the report of the Joint Conference Committee contains no statement of intent that the traditional understanding of "defined contribution plan" was to be abandoned, or that employers who had contracted to pay only a "fixed contribution" would be liable for the unknown cost of pension benefits. The legislative history does not show a conclusion that the "fixed contribution" legal structure was so objectionable in the context of a multi-employer pen-

sion trust as to warrant a mandatory change to a "fixed benefit" legal structure and, further, shows no exploration of potential adverse effects on existing multi-employer pension trusts of such a mandated change in legal structure.

The momentous change in the legal affairs of existing multi-employer pension trusts announced by the Court of Appeals is undetectable in a reading of the Joint Conference Report, or the Act itself, until the "fine print" of the statutory definition of "defined contribution plan" is construed to exclude any pension plan which provides a pension rather than an individual savings account for each participant. The ambiguous words of the statutory definition are not sufficiently compelling to warrant that far-reaching result.

8. The Secretary of Labor and the Secretary of the Treasury Initially Issued Official Pronouncements Under the Act Which Maintained the Traditional Interpretation of "Defined Contribution Plan."

A "target benefit plan" is a specific type of "defined contribution plan" recognized in Section 202(a)(2) of the Act [88 Stat. 853, 29 U.S.C. § 1052(a)(2); 88 Stat. 899, 26 U.S.C. § 410(a)(2)]. The Secretary of Labor described the "target benefit plan" in the first official "Form EBS-1 Plan Description and Instructions" as follows:

> "'Target Benefit Plan' is a plan which provides that *the amount of the employer's contribution has been established at a level to enable the plan to pay a defined benefit to each participant upon his retirement; however, the plan does not promise to pay that benefit; its only obligation is to pay whatever benefit can be provided by the sums contributed for him.*" (Emphasis added.)

The Secretary of the Treasury has published temporary and proposed regulations under § 410 of the Internal Revenue Code describing a "target benefit plan" as follows:

> ". . . [A] *target benefit plan is a defined contribution plan* under which the amount of employer contributions allocated to each participant is determined under a plan formula which does not allow employer discretion and on the basis of the amount necessary to provide a target benefit specified by the plan for each participant. *Such target benefit must be the type of benefit which is provided by a defined benefit plan* . . ." (Emphasis added.) *I.R.C.* Reg. § 1.410(a)-4. Treasury Decision 7380.

These pronouncements were called to the attention of the District Court and the Court of Appeals. But neither PBGC, nor the Secretaries of Labor and the Treasury in their *amicus* brief, ever acknowledged this concern or offered any argument seeking to justify their new position supporting expansion of PBGC's jurisdiction. In erroneously giving "great deference" to PBGC's views, the Court of Appeals never addressed this consideration.

9. The Interests of Sound Judicial Administration Will Be Served by the Granting of This Petition.

The statutory interpretation issues presented by this case are complex and far-reaching. Careful consideration and resolution of those issues will fully occupy the parties and this Court if the petition is granted. Returning the case to the District Court for trial of the constitutional issues and later return to this Court would greatly increase the likelihood of irreparable damage to the financial stability of multi-employer pen-

sion trusts in the interim and, in addition, would expand the scope and complexity of issues presented to much less manageable proportions.

While this case has been pending, numerous other cases (in a total number best known by PBGC) have been filed by trustees of other pension trusts in federal courts in California and across the country seeking the relief against PBGC granted by the District Court below. The proceedings in those cases have been held in abeyance pending disposition of this case. That circumstance encourages the granting of this petition for two reasons. First, no other case presenting the same issues will become available for review by this Court before long delay. Secondly, denial of this petition can be expected to trigger further proceedings in those pending cases, all at great expense to the judicial system and the parties.

Conclusion.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WAYNE JETT,
Counsel for Petitioners.

November 1978.

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN L. CONNOLLY, et al., etc., Appellees, vs. PENSION BENEFIT GUARANTY CORPORATION, etc., Appellant.	)	No. 76-2777 OPINION

On Appeal from the United States District Court for the Central District of California.

Filed: May 4, 1978. Entered: May 9, 1978.

Before ELY and MERRILL, Circuit Judges, and HARPER, Senior District Judge.*

HARPER, Senior District Judge.

This is an appeal by the Pension Benefit Guaranty Corporation (hereinafter referred to as PBGC) from a summary judgment entered in favor of the Board of Trustees of the Operating Engineers Pension Trust (Trustees) which exempted the Operating Engineers Pension Plan (Plan) from coverage under the insurance provisions of Title IV of the Employee Retirement Income Security Act of 1974, 29 USC 1001 et seq. (ERISA or Act).

Federal jurisdiction over this action exists pursuant to 29 USC 1303(f).

On December 1, 1974, the Trustees paid a termination insurance premium of $12,043.00 to the PBGC. On April 10, 1975, the Trustees applied to the PBGC for a determination that the Plan was a defined contribution plan exempt from coverage under the insur-

*The Honorable Roy W. Harper, Senior United States District Judge for the Eastern District of Missouri, sitting by designation.

ance provisions contained in Title IV of the Act, 29 USC 1301 et seq. The PBGC informed the Trustees that the Plan was a defined benefit plan subject to the plan termination insurance coverage. Thereafter, the Trustees made a demand for return of their termination insurance premium, which was refused by PBGC.

On June 17, 1975, the Trustees filed a complaint in the district court for a declaratory judgment, damages and injunctive relief against the PBGC, challenging its determination that the Plan was a defined benefit plan subject to insurance coverage. Upon cross motions for summary judgment, the district court granted summary judgment in favor of the Trustees. *Connolly v. Pension Benefit Guaranty Corp.,* 419 F. Supp. 737 (C.D. Calif. 1976). In its order the district court declared the Plan to be a defined contribution plan exempt from insurance coverage under the Act, enjoined the PBGC from acting inconsistently therewith, and required the PBGC to return the Trustees' premium payment. *Connolly v. PBGC, supra* at 741-42. This appeal followed.

Initially it should be noted that the determination of the PBGC herein is entitled to great deference in the construction and application of ERISA. *Griggs v. Duke Power Co.,* 401 U.S. 424, 433-34 (1971). In *General Electric v. Gilbert,* 429 U. S. 125, 141-42 (1976), quoting from *Skidmore v. Swift & Co.,* 323 U. S. 134, 140 (1940), the Supreme Court stated:

> " 'We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.' "

The Operating Engineers Pension Trust is a joint-labor-management trust established in conformance with §302(c)(5) of the Labor Management Relations Act of 1947, as amended in 1959, 29 USC 186(c)(5). This trust was created in 1960 by agreement between eleven home builders associations and the International Union of Operating Engineers. The trust agreement created the multiemployer pension plan at issue here. The Plan is a tax qualified employee pension plan within the meaning of §4021(a)(2) of ERISA, 29 USC 1321 (a)(2). It is administered by a fourteen-member Board of Trustees appointed in equal part by the employers and the union. The individual plaintiffs are the trustees of the trust. The purpose of the trust is to create a pension fund to which a number of employers make contributions and from which their employees may draw benefits when they reach a stated age of retirement.

Under the pension trust, the employers periodically enter into collective bargaining agreements to establish the amount of their contribution to the Plan. In fulfillment of their obligation under those agreements, the employers contribute a certain amount of money to the Plan each month. The amount contributed by each employer is determined by multiplying their employees' hours of service by a rate specified in the current agreement.

The monthly amount of the pension payable to an eligible participant is determined by multiplying the

Pension Factor in the Plan by the employee's Pension Credits and Prior Service Credits. The Pension Factor is an actuarial tool, calculated to translate plan experience into retirement benefits. In setting the Pension Factor, the Trustees take into account the investment income, gains and losses, expenses, any forfeitures by participants, the mortality experience of the Plan and any variance between actual and anticipated employer contributions and delinquencies. The Pension Factor is periodically revised by the Trustees.

The Pension Credit is a service-related formula determined in part by the amount of time spent on the job by the participant. The Plan also provides for some participants to be entitled to Prior Service Credits, for time spent on the job prior to the execution of this trust and Plan. Pension Credits are earned even if the employer fails to contribute the full amount of his obligation. The employee receives the appropriate pension benefit, as calculated by the above described formula, even though sufficient contributions have not been made on his behalf by his employer to the Plan.

By the express terms of the Plan, the employer's sole obligation to the pension fund is to pay such contributions as required by the collective bargaining agreements. The trust agreement clearly states that the employer's obligation for pension benefits to the employee is ended when the employer pays the appropriate contribution to the fund. This is true even though the contributions agreed upon are insufficient to pay the benefits under the Plan.

ERISA is the product of several years of legislative effort to improve the American pension system. ERISA is a complex piece of legislation which addresses itself

to many problems. One of the foremost concerns of Congress in enacting the Act was to assure workers that retirement benefits would be available when needed. 29 USC 1001(a), (c) provides:

> "The Congress finds that . . . owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to requisite funds to pay promised benefits may be endangered; that owing to the termination of plans before adequate funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits . . .
>
> "It is hereby further declared to be the policy of this Chapter to protect . . . the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to . . . meet minimum standards of funding, and by requiring plan termination insurance."

Consistent with ERISA's remedial function, Congress sought to effectuate the purpose of the Act as far as possible. In a report accompanying an earlier version of the bill, the Senate Committee on Labor and Public Welfare stated:

> "It is intended that coverage under the Act be construed liberally to provide the maximum degree of protection to working men and women covered by private retirement programs. Conversely, exemptions should be confined to their narrow purpose."

S. Rep. No. 93-127, 93d Cong., 1st Sess. 18 (1973).

The issue before the Court is whether the Plan is a defined benefit plan under 29 USC 1002(35) or an individual account or defined contribution plan

under 29 USC 1002(34). If the Plan is a defined benefit plan, it is covered by the termination insurance provisions of the Act. If it is an individual account or defined contribution plan it is not covered by the termination insurance provisions, 29 USC 1321(b)(1), unless the Plan is a "plan under which a fixed benefit is promised if the employer or his representative participated in the determination of that benefit." 29 USC 1321(c)(1). By definition, any plan that is not an individual account or defined contribution plan, must necessarily be a defined benefit plan. 29 USC 1002 (35).

The district court ruled that the Plan is a defined contribution plan, not subject to termination insurance coverage under ERISA. This determination is erroneous.

In its decision the district court looked to the obligation which the employers participating in the Plan have contractually agreed to assume. Because the employers have agreed only to make specified contributions, and have disclaimed any obligation to pay any pension benefit, the district court held that the plan was a defined contribution plan under which no fixed benefit is promised. The district court reached its conclusion by considering that to subject the Plan to ERISA's termination insurance provisions would force upon the employer a greater obligation and liability than he had originally agreed to in his contract. *Connolly v. PBGC*, 419 F. Supp. at 740.

However, this is precisely what the termination insurance provisions of the Act were intended to do. Whenever the PBGC pays pension benefits to participants of defined benefit plans which have terminated with

insufficient assets to pay the benefits promised, (29 USC 1322), the PBGC is entitled to recover the amount of such benefits from the employers who maintained the terminated pension plan, up to an amount not exceeding thirty percent of the net worth of each employer involved. 29 USC 1362-1368. The precise intent of these sections was to impose substantial, new, and in some cases retroactive liabilities upon the contributing employers of the plan.

29 USC 1321(b) provides that termination insurance coverage does not extend to any plan,

> "(1) which is an individual account plan, as defined in paragraph (34) of section 1002 of this title . . ."

29 USC 1002(34) provides:

> "The term 'individual account plan' or 'defined contribution plan' means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account."

The statutory definition of an individual account or defined contribution plan contains two requirements. The first requirement is that a plan must provide for an individual account for each participant. The second requirement is that a participant's benefit must be based solely on the amount in his account. Neither of these requirements is satisfied by the Plan. The Plan does not provide for an individual account for each participant. Contributions on behalf of participants

are pooled in a general fund. While a record of contributions received on behalf of a participant is maintained by the Trustees, the participant has no right, title, or interest in these amounts. Under the structure of the Plan, no purpose is served in providing an individual account for each participant. The amount of a participant's benefit at retirement is not based on the amount of contributions paid on his behalf into an account. Rather the benefit is determined by a service related formula, Pension Credits plus Prior Service Credits multiplied by the Pension Factor. The participant is entitled to receive that amount even though a sufficient amount of contributions has not been made on the participant's behalf.

The legislative history of ERISA clearly demonstrates that the primary purpose for termination insurance is to insure the payment of benefits in the event a plan terminates before it is fully funded. Legislative History of the Employee Retirement Income Security Act of 1974, at 213, 1830-31, 1865-72, 2361, 3371, 3373, 4802 (1976) (hereinafter cited as *Legis. Hist.*)

> "The termination insurance program is intended to work hand-in-hand with the minimum funding standards imposed by the bill, since the latter will limit the losses due to plan termination by requiring more adequate funding of pension plans.

Legis. Hist. at 1094.

In the case of a true individual account plan, there is no possibility that the plan would terminate while being underfunded. Under such a plan, a separate account is kept for each covered employee, and the employee's accrued benefit at all times is simply "the balance of the individual's account." 29 USC 1002(23)(b). Thus by definition, an individual account plan

can never be underfunded. Consequently, the funding provisions of ERISA, subject to certain exceptions, do not apply to such a plan. 29 USC 1081(a)(8). Individual account plans are excluded from ERISA's funding rules because these plans do not specify any benefit beyond the balance of each individual's account at the time it is disbursed.

For a similar reason, an individual account plan is also excluded from termination insurance coverage. 29 USC 1321(b)(1). Congress concluded that in the case of a true individual account plan there was no need for termination insurance, just as there was no need for rules as to the funding of such an account. Since the participant is merely entitled to benefits determined by his own account, there is no unfunded amount to insure. *Legis. Hist.* at 1149.

Defined benefit plans, on the other hand, are subject to being underfunded for a variety of reasons because the benefits are not defined as the eventual balance in the individual's account. A defined benefit plan may provide benefits for service prior to the inception of the plan. In such a case, these prior service benefits need not be funded immediately, but may be amortized over thirty or forty years. 29 USC 1082(b)(B). As stated earlier, the Plan at issue provides for benefits for service prior to the inception of the plan, and the Plan is presently underfunded because *inter alia* of these promised benefits.

A funding deficiency in the Plan may also occur when the Trustees, through the use of the Pension Factor, establish pension benefits in excess of the amount of contributions received during the term of the collective bargaining agreement. Under the type

of plan involved herein, if actuarial assumptions and calculations used in establishing the Pension Factor are correct as of the beginning of the term of the collective bargaining agreement, and the agreed upon employer contributions are adequate and paid when required, there would be no funding deficiency by reason of miscalculation during the term of the collective bargaining agreement. However, when anticipated contributions, relied upon in establishing benefits, exceed actual contributions unfunded liability may occur.

The risk of termination of a multiemployer Taft-Hartley pension plan, such as the plan before the Court, is significantly less than in a single employer plan, because of its larger economic base. Indeed, an effort was made to exempt multiemployer plans from funding and/or termination insurance because of their relatively remote likelihood of termination. However, these proposals for outright exemption of multiemployer plans were rejected. Collectively bargained multiemployer plans were not exempted from the requirement that unfunded past service liability be amortized. Rather, such plans were granted an additional ten years beyond the standard thirty-year period within which to amortize the unfunded past service liability. 29 USC 1082(b)(2)(B).

> "This recognizes that multiemployer plans generally have an added element of financial strength in that their contributions come from a number of employers who as a group are less likely than comparable single employers to experience business difficulties."

Legis. Hist. at 3317.

Recognition of the financial strength of a multiemployer plan is also contained in ERISA's insurance program. With respect to termination insurance, the statutory multiemployer plan premiums were established at one-half the rate for single employer plans. 29 USC 1306(a)(3)(B). The multiemployer plan's lower risk of termination was apparently sufficient to justify a different premium rate; however, it was not sufficient to warrant total exemption from termination insurance coverage.

> "In view of the relatively minor incidence of multiemployer plan terminations the conferees determined to delay mandatory coverage of multiemployer plan terminations until January 1, 1978, but to commence premium payments by such plan as of date of enactment to build up reserves in the event the Pension Benefit Guaranty Corporation extends discretionary coverage prior to that date. It is to be expected that this discretionary coverage will be extended fully to protect employees benefits in multiemployer plans.
>
> "The conferees had no intention whatsoever of treating workers in these plans as 'second-class citizens' and are determined that benefits be fully protected to the statutory limits regardless of the type of plan involved."

Legis. Hist. at 4767.

The district court also held that 29 USC 1321(c)(1) was applicable to the Plan. 29 USC 1321(c)(1) provides:

> "For purposes of subsection (b)(1) of this section, the term 'individual account plan' does not include a plan under which a fixed benefit

is promised if the employer or his representative participated in the determination of that benefit."

The district court reasoned that the independent fiduciary duties of the Trustees necessarily precluded any characterization of the Trustees as employer representatives participating in the determination of pension benefits. *Connolly v. PBGC*, supra at 741.

In light of this Court's determination that the plan is not an individual account plan, and thus not exempt from termination insurance under 29 USC 1321(b)(1), we do not reach the issue of whether 29 USC 1321(c)(1) is applicable to the case at bar.

The district court's decision to proceed with the statutory construction issue without convening a three-judge court was permissible. See *Hagans v. Lavine*, 415 U. S. 528, 543-44 (1974).

The constitutional issues sought to be raised by the plaintiffs were not reached in the district court, and thus not properly before this Court. At this time, the Court makes no ruling with respect to any constitutional issues which the parties may wish to present on remand. Generally, a reviewing Court should remand a case to the district court for consideration of a question not previously considered there. *Boire v. Miami Herald Publishing Co.*, 343 F. 2d 17, 25 (5th Cir.) *cert. denied* 382 U. S. 824 (1965). This Court holds only that: The Plan involved herein is not an individual account plan as defined by 29 USC 1002(34) and thus not exempt from the termination insurance program under 29 USC 1321(b)(1); and that the employer's disclaimer of liability for the payment of benefits does not convert the Plan into an individual account plan.

Accordingly, this case is Reversed and Remanded.

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN J. CONNOLLY, et al., etc., Appellees,	No. 76-2777
vs.	ORDER
PENSION BENEFIT GUARANTY CORPORATION, etc., Appellant.	

Filed: Sept. 6, 1978. Entered: Sept. 8, 1978.

Before: MERRILL and ELY, Circuit Judges, and HARPER, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Ely has voted to reject the suggestion for a rehearing in banc and Judges Merrill and Harper have recommended such rejection.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

APPENDIX C.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOHN L. CONNOLLY, *et al.*, each in his respective capacity as Trustee of the Operating Engineers Pension Trust, Plaintiffs,	No. CV 75-2027-DWW
vs.	ORDER GRANTING SUMMARY JUDGMENT
PENSION BENEFIT GUARANTY CORPORATION, a non-profit corporation established within the Department of Labor of the United States of America, Defendant.	

Entered: Feb. 12, 1976.

The Operating Engineers Pension Trust is a joint labor-management trust created in conformance with § 302(c)(5) of the Labor-Management Relations Act of 1947, as amended in 1959 (29 U.S.C. § 186(c)(5). It was created in 1960 by a written agreement to which several contractors associations and home builders associations were signatories as employers and the international union of operating engineers, local union No. 12, as the organization representing the employees. The individual plaintiffs are trustees of the trust who have the power to administer the Pension Fund and

to administer and maintain the Pension Plan which is the subject of the trust. The purpose of the trust is to create a pension fund to which a number of employers make contributions and from which employees may draw benefits when they reach a stated age of retirement.

Congress has concerned itself over the years with the problem of employee pension funds which have terminated with financial shortages resulting in an inability of many employees to receive expected benefits upon retirement. A recent Congressional effort to bring about a cure for this problem has resulted in the enactment of the Employee Retirement Income Security Act of 1974 (ERISA). Generally, this act seeks to protect the well-being and security of the millions of employees and their dependents who are affected by benefit plans. It seeks to set safeguards for the operation of plans and to establish standards for the administration of pensions in order to minimize terminations of plans and losses to beneficiaries. Section 4002 of the Act establishes within the Department of Labor a corporate body to be known as the Pension Benefit Guaranty Corporation and its purpose is to encourage the continuation and maintenance of voluntary private pension plans so as to provide for timely and uninterrupted payment of benefits to participants. Section 4005 of the Act establishes four revolving funds which are intended to serve as insurance against the failure of the particular types of pension funds which this part

of ERISA is designed to cover. The corporation is empowered to prescribe insurance premium rates which it assesses against certain employers to guarantee that the pension funds created by those employers will not suffer short-fall. In the event of a termination of a pension plan of this type, the employer could be held liable for shortages in the fund up to 30% of the net worth of the employer's business. 29 U.S.C. § 1362 (a) and (b). Not all types of pension plans are intended to be covered under the insurance provisions of ERISA. Section 4021(b) of the Act provides as follows:

> "(b) This section does not apply to any plan—(1) which is an individual account plan, as defined in paragraph (34) of Section 1002 of this title."

Paragraph (34) of Section 3 of the Act provides as follows:

> "The term 'individual account plan' or 'defined contribution plan' means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account."

Also, Section 4021(c)(1) of the Act provides as follows:

> "For purposes of subsection (b)(1) of this section, the term 'individual account plan' does not include a plan under which a fixed benefit is promised if the employer or his representative participated in the determination of that benefit."

Plaintiff trustees administer a pension fund for the benefit of employees within the building industry. Defendant Pension Benefit Guaranty Corporation has taken the position that the type of pension administered by plaintiff trustees is covered by the insurance provisions of ERISA and the corporation compelled plaintiff trustees to pay a premium of $12,043 into its guaranty fund. The plaintiffs contend that their pension fund comes within the exceptions set forth in paragraph (34) of Section 3 of the Act and that they are not covered by the insurance provisions. If plaintiffs' fund is not included within the exceptions just noted, the trustees would also be limited by provisions of ERISA as to the manner in which they could administer the fund over which they are trustees. Additionally, employers who contribute to plaintiffs' fund would be subject to the liability provisions of ERISA in the event of a termination of the plan.

In short, plaintiffs contend that its plan is an "individual account plan" or "defined contribution plan" as referred to in 29 U.S.C. § 1002(34) while the defendant corporation contends that plaintiffs' plan is a "defined benefit plan" as defined in Section 1002(35) and is therefore covered. Plaintiffs' trustees communicated their objections to the defendant corporation upon being required to pay premiums into the corporation's Guaranty Fund, but defendant's legal staff concluded that the Operating Engineers Pension Trust is a Defined Benefit Plan for the purposes of Section 4021(b)(1) because plaintiffs' method of computing a participant's pension benefit appeared to be a formula based on service and therefore within the class of plans called defined benefit plans rather than an individual account plan. In this litigation, which seeks to have this Court

determine whether plaintiffs' plan comes within the exceptions of Section 4021(b), the defendant urges that since it is the agency charged with enforcing ERISA, its determination of coverage should be given more weight than that reached by plaintiff trustees. *Griggs v. Duke Power Co.*, 401 U.S. 424, 434, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

AGREEMENT ESTABLISHING THE OPERATING ENGINEER'S PENSION TRUST

The 1960 agreement which established the trust administered by plaintiffs (hereinafter called the "Trust Agreement") provided that each collective bargaining agreement between the union and the employers would bind the employers to abide by the Trust Agreement and to pay a stated amount into the trust with respect to each hour worked by each employee covered by the collective bargaining agreement. Article II, Section 7 of the Trust Agreement provides as follows:

> "Neither the Employers nor any Signatory Association, or officer, agent, employee or committee member of the Employers or any Signatory Association, shall be liable to make Contributions to the Fund or be under any other liability to the Fund or with respect to the Pension Plan, except to the extent that he or it may be an Individual Employer required to make Contributions to the Fund with respect to his or its own individual or joint venture operations, or to the extent he or it may incur liability as a Trustee as hereinafter provided. Except as provided in Article III hereof, the liability of any Individual Employer to the Fund, or with respect to the Pension Plan, shall be limited to the payments required by the Collective Bargaining Agreements with respect to his or its individual or joint venture operations, and in no event shall he or it be liable or responsible for any portion of the Contributions due from other Individual Employers or with respect to the operations of such Individual Employers. The Individual Employers shall not be required to make any further payments or Contributions to the cost of operations of the Fund or of the Pension Plan, except as may hereinafter provided in the Collective Bargaining Agreements."

Article VII, Section 4 of the Plan provides as follows:

> "This Pension Plan has been adopted on the basis of an actuarial calculation which has established, to the extent possible, that the contributions will, if continued, be sufficient to maintain the Plan on a permanent basis. However, it is recognized that the benefits provided by this Pension Plan can be paid only to the extent that the Plan has available adequate resources for those payments. No Individual Employer has any liability, directly or indirectly to provide the benefits established by this Plan beyond the obligation of the Individual Employer to make contributions as stipulated in any Collective Bargaining Agreement. In the event that at any time the Pension Fund does not have sufficient assets to permit continued payments under this Pension Plan, nothing contained in this Pension Plan and the Trust Agreement shall be construed as obligating any Individual Employer to make benefit payments or contributions (other than the contributions for which the Individual Employer may be obligated by any

Collective Bargaining Agreement) in order to provide for the benefits established by the Pension Plan. Likewise, there shall be no liability upon the Board of Trustees, individually or collectively, or upon the Employers, Signatory Association, Individual Employer, or Union to provide the benefits established by this Plan if the Pension Fund does not have the assets to make such benefit payments."

Article VIII, Section 2 of the Plan provides:

"This Plan has been adopted on the basis of an actuarial estimate which has established (to the fullest extent possible) that the income and accruals of the Fund will be fully sufficient to support this benefit plan on a permanent basis. However, it is recognized as possible that in the future the income or the liabilities of the Fund may be substantially different from those previously anticipated. It is understood that this Pension Plan can be fulfilled only to the extent that the Fund has assets available from which to make payments. Consequently, the Board of Trustees may have prepared annually an Annual Actuarial Evaluation of the Fund and shall take the actuarial status of the Fund into account in determining amendment or modification of this Pension Plan."

FORMULA FOR FIXING PENSION AMOUNT

The monthly amount of the pension payable to a participant who is eligible for a pension in plaintiffs' plan is determined by multiplying the numbers of his respective Prior Service Credits and Pension Credits accumulated by the appropriate Pension Factor. The

Plan provides for some participants to be entitled to Prior Service Credits. It also provides for certain participants to receive Pension Credits pursuant to a prescribed formula. The Pension Factor used to determine the benefit entitlement of participants is fixed from time to time. In setting the Pension Factor, the trustees take into account the investment income, gains and losses, expenses, any forfeitures by participants, the mortality experience of the Plan and the actual anticipated employer contributions and delinquencies.

EMPLOYER CONTRIBUTIONS

Under the Pension Trust created by its signatories in 1960 the various employers would enter into collective bargaining agreements from time to time with the union. As a part of the terms of that agreement the employer obligated himself to make certain contributions into the trust fund for each of his employees, measured by the number of hours worked and any Prior Service Credits or Pension Credits to which the employee would be entitled. The amount the employer is obligated to contribute to the fund may change from time to time. This comes about because the trustees of the Plan are authorized annually to have prepared an actuarial evaluation of the fund which shall consider the actuarial status of the fund and this is taken into account in determining which amendments or modifications shall be made to the Pension Plan. If it appears from the actuarial report that the fund is in peril, the trustees have the power at a given period to compel such additional contributions into the fund from the employers as should preserve the integrity of the fund.

By its terms as quoted hereinbefore, the Plan assures the employer that his sole obligation to the fund is to pay such contributions for each employee as from time to time the plaintiff trustees shall determine is appropriate. The agreement states in clear and concise language not subject to any ambiguity that the employers obligation to the employee for pension benefits is ended when he pays the appropriate contribution into the fund. In no way does the employer under the structure of this agreement promise the employee a defined pension benefit. Rather, it is clear that he only promises that he will pay into the fund each pay period the contribution that is prescribed by the trustees and that his obligation to the fund is then ended.

In negotiating a collective bargaining agreement there is the possibility that a union could make a demand upon an employer to extend to the employee a defined pension benefit, but such has not been done in the contract under review. In the negotiations that attended this agreement the employer demanded that his obligation be ended once he made a contribution to the individual account of the employee and the union accepted the provision. To interpret this carefully constructed agreement as not coming within the exceptions of Section 1002(34) is to force upon the employer a greater obligation and liability than he had agreed to in his contract.

Defendant argues strenuously that plaintiffs' plan is covered by the insurance provisions of ERISA because it is not a true "individual account plan" as defined by Section 1002(34). That section defines an individual account plan as a plan which provides

for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account. Defendant states that because the contributions of the employer to the individual's account is not maintained precisely like the concept of one's savings account in a bank, but instead the money is pooled by the trustees for investment purposes, and because of the computerized method employed by the trustees in reckoning the accumulated amounts contributed to the individual's account from time to time, this destroys proper characterization of the plan as an "individual account plan" or "defined contribution plan." The legislation which must guide the consideration of this dispute is lengthy and complex and represents draftsmanship that is confusing, to say the least, but a fair reading of the Act and the legislative history which preceded the enactment leads me to conclude that the structure of plaintiffs' plan properly comes within the exceptions of Section 1002 and should be characterized as an individual account plan.

Defendant claims that plaintiffs' plan does not come within Section 1002(34) because an "individual account plan" is one which provides for an individual account for each participant and for benefits based *solely* upon the amount contributed to the participant's account, and any income, expenses, gains or losses, and any forfeitures of accounts of other participants which may be allocated to each participant's account. Defendant argues that in the instant plan, benefits are not based solely upon the amount contributed to each participant's account because a part of the retire-

ment benefit is based on past service. The parties stipulate that a participant is entitled to a pension benefit which is determined by multiplying his "Prior Service Credits" by the current "Pension Factor." An employee earns one Prior Service Credit (up to 20) for each year of covered service in the industry prior to the establishment of the plan by the 1960 agreement.

Moreover, defendant argues, the plan provides for a monthly benefit determined by multiplying each "Pension Credit" by the appropriate "Pension Factor." A "Pension Credit" is earned whenever a participant works a given number of hours. The retirement benefits payable to a participant are based directly upon the number of hours worked by the employee and the applicable rate of contributions as reflected in his accumulated Pension Credits, as well as Prior Service Credits.

Moreover, PBGC argues that there is another reason for concluding plaintiffs' plan to be a covered plan. Section 4021(c)(1) of the Act, 29 U.S.C. § 1321(c)(1) provides as follows:

> "For purposes of subsection (b)(1) of this section, the term 'individual account plan' does not include a plan under which a fixed benefit is promised if the employer or his representative participated in the determination of that benefit."

Defendant argues that employer representatives participated in the determination of the benefit in plaintiffs' plan.

As I see it, the employer is signatory to an agreement which sets up a joint labor-management trust which has a Board of Trustees. The Trust binds the employer to pay a stated amount to the Trust for each employee covered by the collective bargaining

agreement. The trustees are the ones who made a determination of the benefits, and this scheme includes no such participation on the part of the employer as is intended in Section 4021(c)(1) of the Act.

I conclude that plaintiffs' plan is a defined contribution plan under which no fixed benefit is promised; that it comes within the exception stated in 29 U.S.C. § 1321(b)(1) and that plaintiffs are entitled to summary judgment. The Court further finds that defendant should be required to return to plaintiff the sum of $12,043 plus interest thereon from the date said sum was paid to defendant and that defendant, its agents, employees and representatives are enjoined from acting in any manner inconsistent with the judgment of this Court as set forth in this memorandum which, pursuant to Rule 52(a) FRCP shall take the place of findings of fact and conclusions of law.

DATED: This 12th day of February, 1976.

/s/ David W. Williams
DAVID W. WILLIAMS,
United States District Judge